

COMMONWEALTH OF KENTUCKY
MINE SAFETY REVIEW COMMISSION
ADMINISTRATIVE ACTION NO. **04 -MSRC- 003**

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF MINES AND MINERALS

COMPLAINANT

Vs.

CLIFFORD MORGAN, JAMES D. BURTON,
CARSON SIZEMORE & **DONAVAN ASHER**

RESPONDENTS

FINAL ORDER REGARDING DONAVAN ASHER

This matter having come before the Commission on the Joint Motion to Approve Settlement Agreement between the Complainant and Respondent Donavan Asher, and the members of the Commission having reviewed the Settlement Agreement filed on April 14, 2004 in the matter herein, and the Commissioners being sufficiently advised,

IT IS HEREBY **ORDERED** as follows:

1. The Joint Motion to Approve Settlement Agreement is **GRANTED**;
2. The Respondent, Donavan Asher's Underground Mine Foreman Certificate, # A – 6 – 97 , issued by the Commonwealth of Kentucky, shall be **PROBATED**, jointly and severally, for a period of one (1) year, effective upon the signing of the settlement agreement of record herein;
3. During said probationary period, if Respondent Donavan Asher willfully violates any Commonwealth of Kentucky or Federal mine safety laws or regulations, the KDMM may file a motion with the Mine Safety Review Commission to revoke Donavan Asher's Underground Mine Foreman's

Certificate, # A – 6 – 97 , issued by the Commonwealth of Kentucky, for the remainder of the one (1) year probationary period. Donovan Asher retains his right to a hearing;

4. Respondent Donovan Asher shall be required to take the ENTIRE **Underground Foreman's Training Class** to be provided by KDMM, pursuant to the terms of the Settlement Agreement;
5. Respondent Donovan Asher shall be required, after completion of the class referenced above, to again take the **Kentucky Underground Mine Foreman's Examination** within one (1) year of the effective date of the Settlement Agreement as provided by the terms of the Settlement Agreement;
6. In the event Donovan Asher does not complete the training and examination outlined above and as provided in the Settlement Agreement his Foreman's certificate referenced herein will be indefinitely suspended until he does pass the Kentucky Underground Mine Foreman's Examination.
7. The Settlement Agreement signed by the parties and filed with the Commission shall be incorporated by reference as if reproduced herein in full as a material part of this FINAL ORDER. A copy is attached hereto;
8. This Final Order only resolves the matters referenced herein, and any new enforcement action or subsequent penalties imposed during any probationary period are in addition to and not in lieu of those that may be sought by KDMM for the acts or omissions during that probationary period. This Final Order in no way prohibits KDMM from investigating or

filing legal action based upon other activities or omissions by the Respondent not arising from the factual basis of the original violation and resolved herein.

9. This Final Order shall be considered to constitute a “first offense” as that term is defined in 805 KAR 8:010, Section 1(5). Future allegations of separate offenses by Respondent Donovan Asher, resulting in an adjudication of guilt by the Commission, shall be deemed “subsequent offenses” as defined by 805 KAR 8:010, Section 1(13);
10. This Final Order represents a final disposition of all issues between the Complainant and the Respondent, Donovan Asher, in these matters. Failure to comply with the terms and conditions of this Final Order may result in further action by the Commission; and
11. Appellate rights: Pursuant to KRS 351.194(8) and KRS 13B.140(1), an appeal of an order of the Commission must be filed in the Franklin Circuit Court within thirty (30) days of the entry of this Final Order. The petition shall include the names and addresses of all parties of record in this proceeding and shall include a statement of the grounds upon which review is requested. A copy of this Final Order shall accompany the petition. Copies of the petition must be served upon the Commission and all parties of record in this proceeding.

Entered this the 16 TH day of May, 2004.


JOHN DAVID PRESTON, CHAIR
MINE SAFETY REVIEW COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing FINAL ORDER regarding Donavan Asher was served by certified mail, return receipt requested, and by regular mail, postage pre-paid to the following this 17TH day of Aug, 2004:

Respondent

Donavan Asher
P.O. Box 1700
Asher KY 40803

And by regular mail postage prepaid to Respondents:

William D. Kirkland, Esq.
Karen Chrisman, Esq.
Mcbrayer, McGinnis, Leslie & Kirkland
P.O. Box 1100
Frankfort, Ky 40602 – 1100
Counsel for Clifford Morgan

Carson Sizemore
P.O. Box 151
Bear Branch KY 41714

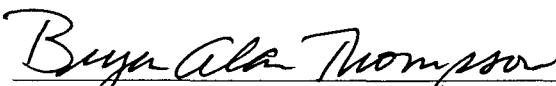
James D. Burton
442 Hurricane Creek Road
Hyden, KY 41749

And by messenger mail to:

Paris Charles, Director
Office of Mine Safety and Licensing
1025 Capital Center Drive
Frankfort Ky 40601

Hon. Tony Oppegard
Office of Mine Safety and Licensing
General Counsel
1025 Capital Center Drive
Frankfort Ky 40601

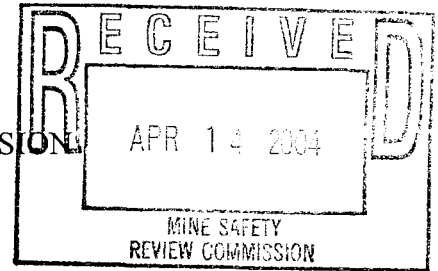
And the original shall be kept on file:
Mine Safety Review Commission
132 Brighton Park Blvd.
Frankfort Ky 40601



Hon. Bryon Alan Thompson

General Counsel
Mine Safety Review Commission

KENTUCKY MINE SAFETY REVIEW COMMISSION



KENTUCKY DEPT. OF MINES & MINERALS)
)
Complainant)
)
v.) Administrative Action No. 04-MSRC-003
)
)
CLIFFORD MORGAN, JAMES D. BURTON,)
CARSON SIZEMORE & DONAVAN ASHER)
)
Respondents)

SETTLEMENT AGREEMENT BETWEEN KDMM & DONAVAN ASHER

Come the Complainant, the Kentucky Department of Mines & Minerals ("KDMM"; "the Department"),¹ and Respondent Donovan Asher ("Asher"), and hereby state that they have agreed to a settlement of the above-styled disciplinary proceeding, according to the following terms:

In consideration for the settlement of this action against him² and the cancellation of the trial - as it pertains to him - that is currently scheduled for June 10, 2004, Asher hereby admits the existence of the deep cut set forth in paragraph 9(h) of KDMM's Complaint and agrees to the

¹ On January 6, 2004, pursuant to Executive Order 2004 -031("Relating to the Reorganization of the Environmental and Public Protection Cabinet"), the Department of Mines & Minerals was "abolished" and re-established as the "Division of Mines & Minerals" within the Department for Natural Resources. This reorganization plan is pending before the General Assembly. The undersigned counsel has been instructed to continue using the pre-Executive Order designation of the agency ("Department of Mines & Minerals") until further notice.

² KDMM and Asher will file a joint motion with the Mine Safety Review Commission to approve the Settlement Agreement and dismiss this action. Said approval is at the discretion of the Commission.

PROBATION OF HIS UNDERGROUND MINE FOREMAN'S CERTIFICATE (# A-6-97)

FOR A PERIOD OF ONE (1) YEAR, effective upon the signing of this Settlement Agreement

by both parties.³ As a condition of probation, Asher must take the entire **UNDERGROUND**

MINE FOREMAN'S TRAINING CLASS - PROVIDED BY KDMM'S BARBOURVILLE

DISTRICT OFFICE - THEN RE-TAKE AND PASS THE KENTUCKY

UNDERGROUND MINE FOREMAN'S EXAMINATION WITHIN ONE (1) YEAR OF

THE EFFECTIVE DATE OF THIS SETTLEMENT AGREEMENT.⁴ If Asher does not

complete the foreman's training class and pass the underground mine foreman's examination

within the one year period, his foreman's certificate will be indefinitely suspended until he does

pass the underground mine foreman's examination.⁵

During his one (1) year period of probation, Asher agrees to comply with all state and federal mine safety and health laws and regulations. The willful violation by Asher of any of said laws or regulations may result in the Department filing a motion with the Mine Safety Review Commission ("the Commission"; "MSRC") to revoke Asher's underground mine foreman's certificate for the remainder of the probationary period.⁶ In that case, Asher would be entitled to

³ However, Asher specifically denies that he violated the law and denies any responsibility for the 58 foot cut.

⁴ Said foreman's class is in addition to any annual refresher training or other safety training that Asher is legally required to take.

⁵ If Asher does not pass the underground mine foreman's examination within the one (1) year probationary period, but subsequently passes the examination, his foreman's certificate (# A-6-97) will be automatically reinstated, and he will not be required to request reinstatement of his certificate through the Kentucky Mining Board.

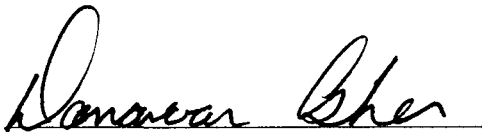
⁶ If the circumstances warranted, KDMM would also retain the right to file a separate action with the Commission seeking other penalties against the Respondent for his actions.

a hearing before the Commission on the allegations against him.

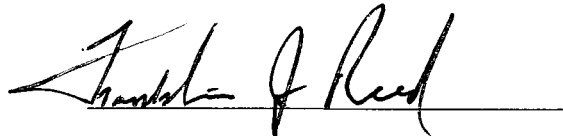
Asher further agrees that this Settlement Agreement and any final order issued herein by the Mine Safety Review Commission will be considered by the Commission to constitute a "first offense", as that term is defined at 805 KAR 8:010, Section 1 (5); and that any future adjudication against him by the Commission - regarding a separate alleged offense - will be deemed a "subsequent offense" as defined at 805 KAR 8:010, Section 1 (13).

Asher understands and agrees that he has had the opportunity to retain an attorney to represent him in this matter, but that he has chosen to represent himself. Asher further states that he has carefully read this Settlement Agreement - or has had it read to him - and has carefully considered the Settlement Agreement prior to signing the Agreement.

KDMM and Asher acknowledge that there are no other promises, inducements, representations, or agreements in connection with this Settlement Agreement other than those expressly set forth in writing herein.



DONAVAN ASHER
P.O. Box 1700
Asher, Kentucky 40803



FRANKLIN J. REED
Acting Agency Head
Kentucky Dept. of Mines & Minerals
P.O. Box 2244
Frankfort, Kentucky 40602

4-13-04
DATE

4-14-04
DATE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Settlement Agreement Between KDMM & Donovan Asher was mailed this 14TH day of April, 2004, to: Clifford Morgan, P.O. Box 47, Wendover, Kentucky 41775; James D. Burton, 442 Hurricane Creek Road, Hyden, Kentucky 41749; Carson Sizemore, P.O. Box 151, Bear Branch, Kentucky 41714; and Donovan Asher, P.O. Box 1700, Asher, Kentucky 40803.



TONY OPPEGARD
General Counsel
KENTUCKY DEPT. OF MINES & MINERALS